IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Victor Mendoza, Plaintiff, v. Hector Medina, individually and d/b/a H&M Interiors, Inc., and H&M Interiors, Inc., an Illinois corporation, and the Chicago Highlands Club, LLC, previously known as Westchester Golf, LLC and Wells and Wells Construction Co., Defendants.	)	No. 19 L 1337

MEMORANDUM OPINION AND ORDER

A property owner may be subject to liability to an injured worker if the owner hires a contractor but retains control over the contractor's work. In this case, valid contracts devolved the property owner's duties to the contractor and no facts in the record infer the property owner retained control over any work at the construction site. For these reasons, the defendant's summary judgment motion must be granted.

Facts

Chicago Highlands Club, LLC, (CHC) owns the Chicago Highlands Club, a golf course located in Westchester. In 2018, CHC executed a construction agreement with Wells & Wells Construction Company (W&W) to construct a clubhouse. CHC did not hire any subcontractors; rather, W&W entered into all the subcontracts, including one with H&M, a roofing subcontractor owned by Hector Medina. H&M, in turn, entered into an oral agreement with Lorenzo Mendoza to supply a crew to work on the clubhouse roof.

Victor Mendoza worked for his father, Lorenzo, at the CHC site. Victor had worked at the site for approximately five days. Then, on March 23, 2018, Victor was installing plywood to steel roof joists. The job required Victor to stand or kneel on pieces of plywood that had previously been secured. At the time, Victor was not using a harness or any other fall protection device. At some point, Mendoza fell off the roof and onto the concrete floor 13 feet below.

Victor filed a second amended complaint against the defendants. The only cause of action at issue in this motion is count one, directed against CHC. Victor alleges that CHC owed him a duty of care while he worked at the job site. He claims CHC breached its duty by, among other things: (1) failing to provide a safe place to work; (2) allowing the creation of an unsafe condition; (3) allowing the unsafe condition to continue; (4) failing to provide and erect safety devices to prevent Victor from falling; (5) failing to provide safety belts or harnesses; and (6) failing to inspect and supervise the job site.

Written discovery produced two executed standard form agreements between CHC and W&W—AIA A101 and AIA A201—in which W&W was authorized to act as the project's general contractor. The agreements defined each party's duties and imposed on W&W all safety responsibility at the work site. One of the general conditions provided that W&W "shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract." CHC did not contractually reserve any responsibilities or duties to perform on the project. Mike Zalud, a W&W employee, acted as W&W's superintendent at the construction site.

The parties deposed various witnesses about the events concerning Victor's fall. No witness indicated that CHC retained control over any of the means or methods of Victor's work. Further, no witness testified that CHC directed any work at the site. CHC was not on site on March 23, 2018 and had no knowledge as to whether Victor used or did not use fall-protection equipment. Victor testified his father would have provided harnesses to Victor.

CHC filed a summary judgment motion as to count one. The parties fully briefed the motion.

Analysis

The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). A defendant moving for summary judgment may disprove a plaintiff's case by introducing affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law. *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). If the

defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). If no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

CHC argues it is not liable to Victor because it did not retain control of the jobsite or the means and methods of Victor's work. The general rule in Illinois is that a person employing an independent contractor is not liable for the independent contractor's acts or omissions. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 276 N.E.2d 336 (1971). CHC's argument and the general rule are grounded on the Restatement (Second) of Torts. Section 414 provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement 2d of Torts § 414 (1965). The comments to section 414 define "retained control" and provide an exception to the general rule. As stated:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations that need not necessarily be followed, or to prescribe alternations and deviations. Such as general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of

> supervision that the contractor is not entirely free to do the work in his own way.

Id. § 414, cmt. *c*. Apart from section 414, and even in the absence of such control, an employer may be subject to direct liability if it assumes supervisory duties on a construction project and fails to exercise them with reasonable care. *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 59 (1st Dist. 2006) (citing Restatement (Second) of Contracts § 304, cmt. *b* (1981)).

In support of its argument, CHC points to the record. There is no evidence that CHC retained any control of any kind over any of the contractors or subcontractors. Victor does not dispute that lack of evidence; nonetheless, he argues that Zalud, a W&W employee and superintendent, was, in fact, an agent of CHC. Victor cites no testimonial or other evidence supporting his proposition. If such evidence did exist, it would have to link CHC and W&W such that CHC knew: (1) Zalud worked for W&W; and (2) of his particular work and supervision at the construction site. There is simply nothing in the record inferring such a relationship based on that sort of detailed knowledge. Without such an evidentiary basis, there is nothing to suggest CHC retained control over any of the work conducted by W&W, in general, or by Victor, in particular.

Conclusion

For the reasons presented above, it is ordered that:

1. CHC's summary judgment motion is granted;
2. CHC is dismissed with prejudice; and
3. The case continues as to the remaining defendants.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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